(1)

No. 06-720

Supreme Court, U.S
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In The

Supreme Court of the United States

WILLIAM RAINEY,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Kentucky

PETITION FOR REHEARING FROM DENIAL OF PETITION FOR A WRIT OF CERTIORARI

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PETITION FOR REHEARING FROM DENIAL OF PETITION FOR WRIT OF CERTIORARI

The petitioner herein respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari entered on January 8, 2007, and (2) returning Mr. Rainey's petition to the active docket for consideration with the pending petition for a writ of certiorari in *Hrasky v. United States*, 453 F.3d 1099 (8th Cir. 2006), *petition for cert. filed*, No. 06-827 (U.S. Dec. 12, 2006). As grounds for this motion, petitioner states the following:

I. The Questions Presented in *Hrasky v. United States*, No. 06-827 (U.S. Dec. 12, 2006) Necessarily Require Consideration of the Questions Presented in Mr. Rainey's Petition.

William Rainey filed his petition for a writ of certiorari on November 21, 2006. On December 7, 2006, the Commonwealth of Kentucky filed a waiver of its right to respond to the petition. Thereafter, Zachary Hrasky filed a petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit in *Hrasky v. United States*, 453 F.3d 1099 (8th Cir. 2006), *petition for cert. filed*, No. 06-827 (U.S. Dec. 12, 2006). On January 8, 2007, this Court denied Mr. Rainey's petition. However, the questions presented in the pending *Hrasky* petition necessarily require consideration of the questions in the *Rainey* petition. As such, both petitions should be considered together.

Hrasky and *Rainey* both involve application of the vehicular search-incident-to-arrest exception to the Fourth Amendment's warrant requirement. Mr. Hrasky and Mr. Rainey were former occupants and well outside of reaching distance of their respective vehicles when police officers arrested them and

performed the searches. Hrasky was handcuffed in the back of a patrol car at the time of the search, and Rainey was arrested over fifty feet away from his vehicle. The search of Hrasky's vehicle occurred over an hour after he was arrested, while the Commonwealth offered no proof of Mr. Rainey's temporal relationship to his vehicle before the search. The searches in both cases uncovered handguns. *Hrasky*, 453 F.3d at 1100; *Rainey*, 197 S.W.3d at 91.

The federal district court in *Hrasky* and the circuit court in *Rainey* both suppressed evidence of the handguns. *Id.* A divided panel of the Eighth Circuit Court of Appeals followed *New York v. Belton*, 453 U.S. 454 (1981) and *Thornton v. United States*, 541 U.S. 615 (2004) in validating the search. *Hrasky*, 453 F.3d at 1103. The dissent in *Hrasky* cites numerous cases questioning the soundness of the entire *Belton* framework. *Id.* at 1107. Similarly, a majority of the justices joining in the *Rainey* plurality opinion described the reasoning in *Belton* and *Thornton* as "seriously flawed," *Rainey*, 197 S.W.3d at 95 (Cooper, J., joined by Johnstone, J., concurring), or questioned whether *Thornton* was a "constitutionally sound decision." 197 S.W.3d at 97 (Roach, J., joined by Lambert, C.J., concurring separately).

Both petitions ask this Court to re-evaluate *Belton* and *Thornton* in the context of vehicle searches incident to arrest. Both petitions ask this Court to redefine or reformulate the "recent occupancy" standard identified in *Thornton*, and both petitions recognize a deep division among the federal and state courts as to whether the Fourth Amendment permits officers to search an arrestee's vehicle when he is arrested beyond reaching distance from it.

The questions presented in the *Hrasky* petition are:

> 1. Whether law enforcement officers' exploratory search of the interior of Petitioner's vehicle, after arresting him beyond "reaching distance" from the vehicle, violated the Fourth Amendment's search-incident-to-arrest doctrine.
>
> 2. Whether the Court – consistent with the suggestions of several Justices – should reconsider its holding in *New York v. Belton*, 453 U.S. 454 (1981), at least to the extent it entitles officers to conduct exploratory of vehicles' interiors incident to arrests for nothing more than traffic violations.

Hrasky v. United States, 453 F.3d 1099 (8th Cir. 2006), *Petition for a Writ of Certiorari*, No. 06-827 (U.S. Dec. 12, 2006).

The questions presented in the *Rainey* petition are:

> 1. Whether a constitutionally valid search of an automobile incident to arrest requires proof of a former occupant's temporal and spatial proximity to the automobile at the time of arrest?
>
> 2. Whether a warrantless search of an automobile is constitutionally valid after the former occupant of the automobile is handcuffed and where the arresting officer testifies that the former occupant never posed a danger of accessing the automobile?

Rainey v. Commonwealth, 197 S.W.3d 89 (Ky. 2006), *Petition for a Writ of Certiorari*, No. 06-720 (U.S. Nov. 21, 2006).

While the questions presented in *Hrasky* are more expansive than those in *Rainey*, full consideration of the vehicular search-incident-to-arrest doctrine necessarily requires examination of the narrower questions presented

in *Rainey*. However, *Hrasky* does not analyze the specific questions presented in *Rainey*. Only both petitions provide a full range of questions and should be considered in tandem before this Court grants or denies the petitions.

II. Combined Consideration of the *Rainey* and *Hrasky* Petitions Will Not Unduly Delay Disposition of Either Case.

Although the *Hrasky* petition was filed after Mr. Rainey filed the petition for a writ of certiorari in the present case, consideration of both petitions will not cause undue delay. In *Hrasky*, the United States was granted an extension of time until February 15, 2007 to file a response to the petition for a writ of certiorari. Accordingly, the *Hrasky* petition will be distributed no later than February 21, 2007 for the conference on March 16, 2007. If this Court vacates denial of the petition and considers it with the *Hrasky* petition, there will be no undue delay in disposition of this case when it returns to the active docket. Likewise, if the Court returns the *Rainey* petition to the active docket the result will not procedurally affect *Hrasky*.

CONCLUSION

For the foregoing reasons, as well those contained in the petition for a writ of certiorari, the petition for rehearing should be granted. This Court should vacate its denial of the petition for writ of certiorari entered on January 8, 2007 and return Mr. Rainey's petition to the active docket for consideration with the pending petition for a writ of

certiorari in *Hrasky v. United States*, 453 F.3d 1099 (8th Cir. 2006), *petition for cert. filed*, No. 06-827 (U.S. Dec. 12, 2006).

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that this Petition for Rehearing is submitted in good faith and not for delay. This Petition for Rehearing is restricted to the grounds set out in Rule 44.2.

_____
Kevin C. Burke